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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
Wolverine Oil & Supply, Inc.,) Docket No. I.F. & R.-V-27-90
Respondent)

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR AN ACCELERATED DECISION

The complaint in this proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. § 1361), issued on September 28, 1990, alleged that Respondent Wolverine failed to comply with the reporting requirements of Section 7(c)(1) of Act, and the regulations promulgated at 40 CFR § 167. These regulations mandate that any pesticide producer must file an annual "Pesticides Report for Pesticide-Producing Establishments" ("pesticides report"), informing the EPA of any pesticides currently being produced, those produced in the previous year, and those sold or distributed during the previous year. A report form is sent to the producer by EPA, and the completed report must be submitted by March 1 of each year.

Wolverine received a blank pesticides report for 1989 from the EPA in early 1990, but did not file the report by the March 1, 1990, deadline. EPA issued a Notice of Warning on August 7, 1990, indicating that EPA had not yet received the required report and that Wolverine was in violation of FIFRA (C's pre-hearing exchange,

Exh 3). On September 28, 1990, EPA filed a formal complaint against Wolverine, proposing a \$5,000 penalty pursuant to EPA's penalty policy for FIFRA violations.^{1/}

On October 5, 1990, a week after issuance of the complaint, EPA received Wolverine's completed 1989 pesticides report. Wolverine did not file an answer to the complaint within 20 days of receipt of the complaint, as required by 40 CFR § 22.15(a). EPA subsequently moved for a default judgment against Wolverine, pursuant to 40 CFR § 22.17(a), on July 25, 1991.^{2/}

On September 18, 1991, Wolverine, through counsel, filed a Motion for Leave to File Out of Time and a Response to Motion for Default and Request for Leave to File an Answer. Wolverine's motions were granted by the Regional Judicial Officer on December 6, 1991, and Wolverine filed an answer to the complaint on December 17, 1991.

Wolverine alleged that it had previously followed the registration and reporting requirements [promulgated] by EPA very carefully and that in 1989, the reporting year at issue, it had poured 15 gallons of bactericide from a 55-gallon drum, previously purchased from Buckman Laboratories, into three five-gallon containers, which were sold to customers of Wolverine. Wolverine

^{1/} See "Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)," dated July 2, 1990.

^{2/} 40 CFR § 22.17(a) states: "A party may be found to be in default. . . upon failure to file a timely answer to a complaint."

implies, without flatly stating, that the mentioned actions were the only activities by it which could be regarded as pesticide production during the calendar year 1989. While admitting that it had failed to timely file the pesticides report for 1989, Wolverine contends that it was not subject to the reporting requirements, because it was not a "producer" as defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w).^{3/} Alternatively, Wolverine argues that, if it were deemed to be a producer, the proposed fine of \$5,000 is excessive, in that a warning letter would be a more appropriate sanction. Wolverine requested a hearing pursuant to 40 CFR § 22.15(c).

In accordance with an order of the ALJ, the parties have filed timely pre-hearing exchanges. Under date of June 5, 1992, Complainant filed a motion for an accelerated decision, alleging that there is no dispute as to material fact and that it is entitled to judgment as a matter of law. Additionally, Complainant contends that the proposed penalty of \$5,000 was computed in

^{3/} Section 2(w) of FIFRA defines producer and produce as follows:

(w) Producer and produce.--The term "producer" means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide. The term "produce" means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide. The dilution by individuals of formulated pesticides for their own use and according to the directions on registered labels shall not of itself result in such individuals being included in the definition of "producer" for the purposes of this subchapter.

accordance with the FIFRA Enforcement Response Policy, is reasonable and that an order assessing Wolverine the full amount of the proposed penalty should be entered.

Wolverine's Opposition

Wolverine responded to the motion and submitted a brief in support thereof under date of June 17, 1992 (Brief). As recited in its answer to the complaint, Wolverine states that it purchased bactericide in 55-gallon drums from Buckman Laboratories and repackaged the bactericide in five-gallon containers for sale to its customers (Brief at 1). According to Wolverine, at no time did it manufacture, prepare, compound, propagate, or process any pesticide or active ingredient used in producing a pesticide. Wolverine says that it registered under FIFRA at the instance of Buckman Laboratories, who apparently insisted that Wolverine register its establishment, because the regulations in 40 CFR Part 167, include "to repackage" in the definition of produce or producer.

Wolverine asserts that the addition in the regulation (40 CFR § 167.3) of the term "repackage" to the statutory definitions of "produce" and "producer" is outside the Agency's statutory grant of authority.^{4/}

^{4/} The regulation 40 CFR § 167.3 defines produce and producer as follows:

Produce means to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to section 5 of the Act, any
(continued...)

According to Wolverine, Complainant regards use of EPA forms as an admission that the establishment registrant is a producer, for it states that one must use EPA forms, which are allegedly not in compliance with the statute, in order to register and then, if the forms are properly filed, the registrant is precluded under the Agency's contention from arguing that the forms are improper under the statute (Brief at 2). Wolverine characterizes this argument as ridiculous and asserts that EPA has nowhere shown authority to expand the statute to include entities which were not intended to be covered by Congress.

Regarding the penalty, Wolverine cites Katzsen Bros., Inc. v. U.S. EPA, 839 F.2d 1396 (10th Cir. 1988), and argues that the fact the violation herein alleged had no affect on human health or the environment should have been considered by Complainant in arriving at the proposed penalty (Brief at 3). Additionally, it contends that factual issues raised by the Katzsen Bros. standard have not been addressed, thus precluding the grant of Complainant's motion.

In conclusion, Wolverine argues that Complainant's motion should be denied and the action dismissed, because it is not a "producer" as defined by the statute. In any event, Wolverine

^{4/}(...continued)

active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

Producer means any person, as defined by the Act, who produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling and relabeling).

contends that because there was no harm to human health or the environment, there is no justification for not issuing a warning letter in lieu of a penalty and that factual issues raised by the Katzsen Bros. standard require the denial of Complainant's motion.

D I S C U S S I O N

Although admitting that it "repackaged" bactericide purchased from Buckman Laboratories, Wolverine's basic contention is that it is not a "producer" as defined in Section 2(w) of FIFRA (supra note 3). It argues that the addition in the regulation (40 CFR § 167.3, supra note 4) of the words "repackage" and "otherwise change the container of any pesticide or device," exceeds the Administrator's authority under the Act and, accordingly, that the regulation is invalid.

Although the validity of an Agency regulation may not normally be placed in issue in an administrative enforcement proceeding, it is concluded that the regulation in question here is a sufficiently reasonable interpretation of the statute as to withstand a court challenge. It should be emphasized that Section 7(c)(1) of the Act specifically authorizes the Administrator to promulgate regulations as to the reporting of, inter alia, pesticide production, sale and distribution. Moreover, Section 25 of the Act (7 U.S.C. § 136(w)) authorizes the Administrator to prescribe, in accordance with the procedure described in paragraph 2, regulations to carry out the provisions of this subtitle (subchapter). The Administrator has done so and since the earliest proposed regulations implementing

Section 7 of FIFRA has defined the scope of the term "production" broadly as including the manufacture of technical material, the formulation and reformulation of pesticidal material including pesticides used in blending and the repackaging of pesticide product (emphasis supplied). 38 Fed. Reg. No. 141 (July 24, 1973). Although no rationale for including "to repackage" in the definition of "produce" was stated,^{5/} the word "prepare," used in Section 7, ordinarily means "to put into condition for a particular use, application or disposition"^{6/} and is seemingly sufficiently elastic to include "repackage" or repackaging. In this regard, see PBI-Gordon Corp. v. Thomas, 609 F.Supp. 135 (D.C. Mo. 1985) (regulation, extending "formulator's exemption" to the submission of data required as a condition of registration, to, inter alia, other than end-use products, held to be a reasonable interpretation

^{5/} It is worthy of note that the Agency added the words "to package, repackage, label or relabel" to the definition of produce in 40 CFR § 167.3, with no other apparent explanation than that the addition was "to more accurately reflect existing practices of the Agency." See Final Rule, 53 Fed. Reg. 35056, September 8, 1988, effective August 9, 1989 (54 Fed. Reg. 32638-39, August 9, 1989).

^{6/} Webster's Third New International Dictionary (1986).

of the exemption and within the Agency's general authority to promulgate regulations under Section 25).^{7/}

Even if Section 2(w) be regarded as ambiguous in defining the scope of "produce" and "producer," it is, of course, well settled that an agency's consistent and long-standing interpretation of a statute it is charged with administering is entitled to deference. See Chevron USA v. NRDC, 467 U.S. 837, 81 L.Ed.2d 694 (1984). As we have seen, the Agency has interpreted "produce" as including "to repackage" since 1973.

Moreover, even if the regulation expanding the definition of produce to include "to repackage" were held to be beyond the Agency's authority, such a holding would not relieve Wolverine of the requirement for filing a pesticide's report. This is because it is Wolverine's status as the owner or operator of a registered establishment rather than pesticide production which triggers the requirement for a report. This is evident from the fact that Section 7 (supra note 1) provides that the report shall include pesticides which the producer has sold or distributed during the

^{7/} Arguments that a particular regulation is contrary to the Act or beyond the intent of Congress would appear to be more difficult to sustain, since Section 25 has been amended to provide that regulations under the Act will not be effective until specified times after the regulations have been submitted to Congress. See P.L.-94-140, November 28, 1975, 89 Stat. 753 and P.L. 100-532, October 25, 1988, 102 Stat. 2682.

past year as well as pesticides produced during that year. It is also evident from the requirement of the regulation (40 CFR § 167.85(d)), and the instructions for completing the report form, that a report is required even if the producer has produced no pesticidal product for the reporting year. See, e.g., In the Matter of Hawk Creek Laboratory, Inc., Docket No. I.F. & R.-III-435-C (Order Granting In Part Motion for Accelerated Decision, July 13, 1993), copy enclosed. Accordingly, it is concluded that Wolverine was required to submit a pesticides report for the calendar year 1989 on or before March 1, 1990, and that it violated the Act by failing to do so.


Wolverine has, however, contested the amount of the proposed penalty in its answer. Because determining the amount of a penalty on a motion for accelerated decision, no less than determining damages on summary judgment, is seldom, if ever appropriate, the motion for an accelerated decision insofar as it seeks assessment of a penalty of \$5,000 will be denied, notwithstanding Complainant's contention that the penalty was determined in accordance with the FIFRA Enforcement Response Policy. See, e.g., Hawk Creek, supra.

O R D E R

Complainant's motion for an accelerated decision insofar as it seeks a finding that Wolverine violated the Act by failing to timely file a pesticide report for the calendar year 1989 is granted. The motion insofar as it seeks assessment of a penalty is

denied. The amount of the penalty remains at issue and will be determined after further proceedings, including a hearing, if necessary.

Dated this 3rd day of August 1993.


Spender T. Nissen
Administrative Law Judge

Enclosure

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR AN ACCELERATED DECISION, dated August 3, 1993, in re: Wolverine Oil & Supply, Inc., Dkt. No. IF&R-V-27-90, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon
Legal Staff Assistant

DATE: August 3, 1993

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